84-1537 (1)

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EDUCATIONAL BOOKS, INC.

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

THOMAS J. MORRIS
2060 North 14th Street
Arlington, Virginia 22201
(703) 524-1900
Attorney for Petitioner

26 pp

QUESTION PRESENTED

CAN THE POSSESSION OF TEN FILMS SUPPORT TEN SEPARATE CONVICTIONS UNDER A STATUTE PROSCRIBING POSSESSION WITH INTENT TO RENT ANY OBSCENE ITEMS CONSISTENT WITH THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY?

TABLE OF CONTENTS

	Page
Question Presented	i
Index of Authorities	iii,iv
Opinion Below	1
Statement of Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	19
Appendix	
"A" Opinion of the Virginia Supreme Court	21

INDEX OF AUTHORITIES

	Page
UNITED STATES CONSTITUTION, Fifth Amendment	2,4
CODE OF VIRGINIA, (1950 As Amended) §18.2-374.4	3,7

Cases:

BELL v U.S., 349 U.S. 81, S.Ct. 620, 99 L.Bd 905 (1955)	17
BLOCKBURGER v U.S., 284, U.S. 299, 525 Ct 180, 76 L.Bd 306 (1932)	6,7,16,18
BROWN v OHIO, 432 U.S. 161 (1977)	9
BROWN v U.S., 623 F.2d 54 (9th Cir.1980)	17
COMM. v ALEXANDER, 20 S.E. 782	7,9,12
COMM. v BELGRAVE, 391 A2d 662 (1978)	13
COMM. v BUSER, 419 A2d, 1233 (1980)	13
COMM. v COX, 209 Pa. Super. 457, 228 A2d 30	14
COMM. v COX, 209 Pa. Super---(1967) allocutur refused	14
COMM. v CROKER, 421 A.2d 818 (1980)	13
COMM. v JACKSON, 412 A.2d 610 (1929)	13
COMM. v LEZINSKY, 264 Pa. Super. 476, 400 A.2d 184 (1979)	14
COMM ex rel. SHADDOCK v ASHE, 340 Pa. 286, 17 A.2d 190 (1940)	14,15

Index cont'd

	Page
COMM. v WALKER, 468 Pa. 323, 362 A.2d 227 (1976).....	14
COUSINS v STATE, 354 A.2d 825.....	6
GAVIERES v U.S., 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911).....	7
HOLLY'S CASE, 113 Va. 769, 75 S.E.88, (1912).....	5
JONES v COMM., 218 Va. 18 (1977).....	5
PANDELLI v U.S., 635 F.2d 533 at 539 (6th Cir 1980).....	19
SIMPSON v U.S., 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed. 2d 70 (1978).....	16,17
THOMAS v WARDEN, #81-6753, U.S. 4th Crt. Ct. Appls.....	15
TURNER v COMM., 221 Va. 513.....	12
U.S. v BARRINGTON, 662, F.2d 1046, (4th Cir. 1981).....	19
U.S. v LEWIS, 662 F.2d 1087 (4th Cir. 1981).....	11
U.S. v MASON and BURGESS, 611 F.2d 49 (4th Cir. 1979).....10,11,12	
WHALEN v U.S., 100 S.Ct. 1432 (1980)..	19
22 C.J.S. §285, Fa. 31.50 and 31.55...	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDUCATIONAL BOOKS, INC.

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

COMES NOW the Petitioner, Educational Books, Inc., by counsel, and prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled cause on the 29th day of January 1985.

OPINION BELOW

By letter dated the 29th day of January

1985, the Virginia Supreme Court denied the Petitioner's Petition for Appeal. A copy of the letter is appended hereto as Appendix A.

STATEMENT OF JURISDICTION

The final Order denying the Petitioner's Petition for Appeal was entered by the Supreme Court of Virginia on the 29th day of January 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the and or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 18.2-374(4), Code of Virginia, 1950, as amended, provides:

It shall be unlawful for any person knowingly to:

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

STATEMENT OF THE CASE

On August 17, 1983, an investigator with the Fairfax County Police Department, visited

the premises of the Petitioner, Educational Books, Inc., in Fairfax County, Virginia, and viewed ten (10) films in projection booths located within the store. On the basis of that visit, a search warrant was issued and executed the same day. The ten films that the investigator viewed were seized and the Petitioner was subsequently indicted for ten (10) counts of knowingly possessing an obscene item with the intent to rent in violation of §18.2-374(4) of the Code of Virginia, 1950, as amended.

On December 7, 1983, the Petitioner was tried before a jury and convicted on all ten counts. The jury imposed the maximum fine on each count. The trial court denied the petitioner's post-trial motions and imposed the jury verdict.

REASONS FOR GRANTING THE WRIT

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall for the same offense be put twice in jeopardy of life or limb. This fundamental principle does not permit a

single crime to be subdivided into two (2) or more offenses and a series of charges may not be based on the same act. (See 22 C.J.S. §285, fn 31.50 and 31.55). In Virginia and elsewhere, the "same evidence" test is the standard for determining whether different offenses are deemed the same for double jeopardy purposes. To determine whether two offenses are different, the test is whether one offense requires proof of an additional fact, which the other does not, even though each offense may arise from the same transaction and some of the acts may be necessary to prove both. See Jones v Commonwealth, 218 Va 18, 235 S.E. 2d 313 (1977).

In Holly's Case, 113 Va 769, 772, 75 S.E. 88, 89 (1912), quoted in Jones, supra, at p.761, the Court stated:

> The theft of several articles at one and the same time constitutes an indivisible offense, and a conviction or acquittal of any one or more of them is a bar to a subsequent prosecution for the larceny of

the others.

The analytical test established by the United States Supreme Court in the case of Blockburger v United Staes, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) is dispositive:

> When the same act or transaction constitutes a violation of two distinct statutory provisions. The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. 284 U.S. at 304 (emphasis added)

Similarly, the issue was recently addressed by the Maryland Supreme Court in the case of Cousins v State, 354 A.2d 825, where the Court stated:

> If each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or

> criminal episode. Only where one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact, are the offenses deemed the same for double jeopardy purposes, with successive prosecutions, and multiple punishments being prohibited [citing Blockburger, supra, and Garieres v United States, 220 U.S. 338 (1911).]

If this test is not satisfied, if the offenses charged are revealed by it to be "only one", double jeopardy results from the prosecution or successive prosecutions.

In the case at bar, the Defendant was prosecuted under Section 18.2-374.4 of the Code of Virginia, 1950, as amended. That section makes it unlawful for any person to knowingly:

Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. As far back as 1894, the Supreme Court of Virginia in Commonwealth vs Alexander, 20 S.E. 782, stated:

The authorities are abundant in support of the contention of the attorney general that where several articles of property are stolen at the same time and place though the stolen goods belong to different persons, the stealing is regarded as one transaction, and therefore as one offense, which may be charged in a single count. Hence, whether in a case like the present, the indictment is double, depends upon whether it charges more than one larceny or taking, and not on the number of articles taken, or their ownership. Lord Hale lays it down that if the accused at the same time steals goods from A to the value of sixpence, goods of B to the value of sixpence, and goods of C to the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny at common law, because it is one entire felony, done at the same time, though the persons had several

> properties, and therefore, in one indictment, they make grand larceny.(emphasis added)

Applying the Alexander rationale to this case, it is clear that the possession is the crux of the offense, and not the number of items that could be possessed. Assuming that it is the content of the film that renders it obscene, each frame could arguably be held to be an "obscene item" within the contemplation of the statutory prohibition. The fact that they were all "perchance in a bundle" i.e., one roll of film, or in several bundles, i.e., several rolls of film, is of no consequence, the arbitrary division of the crime into several separate offense cannot be tolerated under the Fifty Amendment as stated by the United States Supreme Court in Brown v Ohio, supra, in 1977:

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple crime into a series of temporal or spacial

units.

The Fourth Circuit Court of Appeals has discussed the "multiple charge but single transaction" situation in two recent cases. In United States v Mason and Burgess, 611 F.2d 49 (4th Cir. 1979), the court looked to Congressional intent to determine the "allowable unit of prosecution" when thre is simultaneous receipt by a convicted felon of multiple weapons and simultaneous execution of multiple forms by the felons in connection with the acquisition of the weapons.

Since the "definative unit of prosecution" could not be determined by the language of the sttute or its legislative history, the Court followed prior United States Supreme Court decisions requiring that any ambiguity must be resolved in favor of the accused. Therefore, the Court held that the simultaneous receipts of multiple weapons by the defendant can only be treated as one offense, and that the simultaneous execution of multiple forms during the acquisition of those weapons can also only be

treated as one offense. The multiple convictions were set aside.

The Mason decision, supra, was recently followed by the Fourth Circuit Court of Appeals in the case of United States v Lewis, 662 F.2d 1087 (4th Cir. 1981), arising from the United States District Court for the Eastern District of Virginia at Alexandria. The Court held that the federal kidnapping statute created a single crime with four jurisdictional bases, not four separate and distinct crimes. Consequently, the Defendant's conviction based upon the same acts under the separate count with a different jurisdictional basis (i.e., "Kidnapping within special maritime or territorial jurisdiction of the United States) was set aside.

Applying these principles to the case at bar, a close scrutiny of the involved statute reveals no legislative intent in regard to the use of the term "item". Indeed, the use of the term was probably employed to cover all types of materials rather than to single out each individual item. Similarly, the statute re-

veals no intent to require more than "one unit of prosecution" per possession. Since the legislative intent on this issue is not clearly established, the Courts have consistently required that doubt or ambiguity be resolved in the favor of the accused. Alexander, supra; Mason, supra; and Lewis, supra. Therefore, nine of the ten convictions involved here should be reversed on the ground that the indictment is duplicitous.

Another function of the double jeopardy protection is to ensure that multiple punishments are not imposed for the same offense. Turner v Commonwealth, 221 Va 513, 273 S.E. 2d 36, at 529. Even if this Court rules that the defendant can be constitutionally convicted on each of the ten separate counts this "merger of sentences doctrine" would prevent this defendant from being sentenced on any more than one count that characterizes the various separate "possession". The "merger of sentences doctrine" is concerned not with conviction, but with punishment. As was stated by Judge

Spaeth, in Commonwealth v Crocker, 421 A.2d 818 at 820 (1980), for the Superior Court of Pennsylvania:

> "...The merger of sentences doctrine is concerned not with conviction but punishment; its purpose is preclude the imposition of separate punishments for what in practical effect was but a single criminal act. Thus, in merger of sentences cases, we focus not only on the similarity of the elements of the crimes but also, and primarily, on the facts proved at trial, for the question is whether those facts how that in practical criminal act, in which case there will be merger and only a single sentence may be imposed, or more than a single act, in which case there will be no merger and a sentence may be imposed for each act. See Commonwealth v. Buser, 419 A.2d 1233, 1236-1237 (1980); Commonwealth v. Jackson, 412 A.2d 610, 613 n.8 (1979); Commonwealth v. Belgrave, 391 A.2d 662, 567 (1978) (CERCONE, P.J., concurring an

dissenting)("unique facts"). If there has been but one criminal act, even though it caused several injuries still there has been but one crime, for which there may be but one penalty. See Commonwealth v. Walker, 468 Pa. 323, 331, 362 A.2d 227, 231 (1976). Similarily, if there have been several acts but all were part of a single transaction and differed, if at all, only in degree, there may be but one penalty. Commonwealth ex rel. Shaddock v. Ashe, 340 a. 286, 288, 17 A.2d 190 (1940). See Commonwealth v. Cox, 209 Pa. Super. 457, 228 A.2d 30, allocatur refused, 209 Pa. Super. ----- (1967)(acts of kissing victim and fondling her breasts part of single criminal act of intercourse). Thus, in Commonwealth v. Lezinsky, 264 Pa. Super. 476, 400 A.2d 184 (1979), this court en banc held that the defendant's conviction of criminal mischief merged for sentencing purposes with his conviction of arson.

In so holding, Judge Van der Voort cited the decisions in Shaddock and Walker and stated:

'In our present case, although there were various consequences to various victims, the consequences derived from a single "act" or "transaction", specifically the ignition of the barn, which may be the basis of various charges, but ultimately of only one sentence.'"

Where a multiple-punishment-for-single-offense claim of double jeopardy is made, the first inquiry is whether as a matter of legislative intent there are single or multiple offenses. As stated by the Fourth Circuit, this approach requires the court to determine whether the legislature intended that 'an arguably single or continuous criminal episode could result in multiple units of prosecution based upon particular factors of time or other circumstances dividing the whole into discrete parts'. See Thomas vs Warden, #81-6753, U.S. 4th Cir. Ct.Appls, pg.4. This approach was

applied in Simpson vs United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed. 2d 70 (1978), wherein the Supreme Court held that only a single sentence was permitted following conviction under the Federal Bank Robbery Statute and the Firearms Statute. The use of the firearm occurred in the course of the bank robberies. The Supreme Court proceeded upon the assumption that the Blockburger test had been met, i.e., that "each provision required proof of a fact which the other did not", yet found other indications of contrary congressional intent outweighed the Blockburger indicia. However, the court, in holding for the defendant, stated:

> "To construe the statute to allow additional sentence authorized by 'the firearms Statute' to be pyramided upon the sentence already enhanced under (the Bank/Robbery Statute) would violate the established rule of criminal statutes should be resolved in favor of lenity'. See 435 U.S. at 14, 198 S.Ct. at 913."

The Simpson court had simply followed its long-standing practice of construing applicable statutes to determine whether "pyramiding" of sentences be allowed where there was one continuous act. See Bell vs United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). The Supreme Court in Bell declined to permit more than a single punishment where the defendant was convicted under two counts for violation of the Mann Act. He had transported across state lines two different women, albeit on the same trip and in the same vehicle. The essence of the opinion is contained in the closing sentence:

> "...If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses..."
> (emphasis added)

The Ninth Circuit Court of Appeals in Brown vs United States, 623 F.2d 54, (9th. Cir. 1980), stated "the rule of lenity" as follows:

"A Court may not impose consecutive sentences for a single transaction that violates more than one statutory provision or purpose unless Congress has clearly expressed its intent to make each violation within that single transaction a separate offense requiring separate punishment..." (emphasis added) 623 F.2d at 57.

All in all, the question this Court must decide is the following: If this Court finds that the defendant can be convicted of each of the ten counts under the Blockburger test, i.e., that each count requires proof of a fact which the other does not, then this Court must examine the obscenity statute to determine what the legislative intent was as to whether multiple punishments should be permitted when there was undisputably only one separate single transaction. Unless the legislative intent is clear that ten separate fines be imposed, the ambiguity should be resolved in

favor of lenity. See Whalen vs United States, 100 S.Ct. 1432, at 1439 (1980); United States vs Barrington, 662 F.2d 1046, at 1050 (4th Cir. 1981); Pandelli vs United States, 635 F.2d 533 at 539 (6th Cir. 1980).

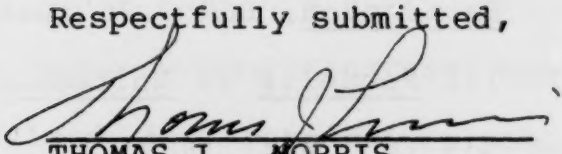
A close examination of the applicable Virginia statutes show no legislative intent to pyramid sentencing and punishment for each item possessed with the requisite intent in single transactions. The Defendant contends that at most, this Court can only impose the jury sentence to the maximum allowable fine for only one of the ten "possessions".

CONCLUSION

And in conclusion, the maximum conviction, based upon the trilogy of argument, may not exceed one conviction; and based upon the foregoing arguments and authorities, the petitioner prays that its Petition for Writ of Certiorari to the Supreme Court of Virginia be

granted.

Respectfully submitted,



THOMAS J. MORRIS
2060 North 14th Street
Arlington, Virginia 22201
Telephone: (703)524-1900
Attorney for Petitioner

Dated: March 25, 1985

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition has been made on Counsel for the Respondent by mailing copies thereof on this 28th day of March, 1985, in envelopes, with postage prepaid, properly addressed to them as follows:

Gerald L. Baliles, Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Robert F. Horan, Commonwealth Attorney
Fairfax County Courthouse
4110 Chain Bridge Road, Suite 123
Fairfax, Virginia 22030

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 29th *day of* January, 1985.

Educational Books, Inc., Appellant,

against Record No. 840621
Circuit Court No. 40727

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: Cynthia L McCoy
Deputy Clerk

BEST AVAILABLE COPY

FILED
APR 29 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1537

In The

Supreme Court of the United States

October Term 1984

EDUCATIONAL BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

GERALD L. BALILES
Attorney General of Virginia

*JERRY P. SLONAKER
Senior Assistant Attorney General

MARLA LYNN GRAFF
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

**Counsel of Record*

BEST AVAILABLE COPY

21pp

QUESTION PRESENTED

Whether ten charges of possession of an obscene film with intent to rent, tried in a single trial, resulting in ten separate convictions and punishments for the rental of ten different films is consistent with the constitutional guarantees against double jeopardy.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ..... iii, iv, v

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND VIRGINIA STATUTORY PROVISIONS INVOLVED 2

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

REASONS FOR DENYING THE WRIT:

I. The Principles Protecting a Defendant Against Double Jeopardy Have Not Been Violated in the Instant Case 3

II. Legislative Intent Controls with Regard to Multiple Punishments and the Virginia Supreme Court Has Ruled as a Matter of State Law that Each Item Constitutes a Separate Violation Warranting Separate Punishment 6

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Albernaz v. *United States*, 450 U.S. 333 (1981) 9

Barclay v. *Florida*, 463 U.S. ____, 103 S.Ct. 3418, *reh. denied*, ____ U.S. ____, 104 S.Ct. 209 (1983) 9

Page

Bifulco v. *United States*, 447 U.S. 381 (1980) 9

Blockburger v. *United States*, 284 U.S. 299 (1932) 5, 6, 8

Blythe v. *Commonwealth*, 222 Va. 722, 284 S.E.2d 796 (1981) 4, 5

Brown v. *Ohio*, 432 U.S. 161 (1977) 5, 6

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 9

Educational Books v. *Commonwealth*, 228 Va. ——, 323 S.E.2d 84 (1984) 6, 7, 9, 10

Fitzgerald v. *Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983) 6

Garner v. *Louisiana*, 368 U.S. 157 (1961) 6, 10

Gavieres v. *United States*, 220 U.S. 338 (1911) 8

Illinois v. *Vitale*, 447 U.S. 410 (1980) 4

Jackson v. *Virginia*, 443 U.S. 307 (1979) 9

Jones v. *Commonwealth*, 218 Va. 18, 235 S.E.2d 313 (1977) 8

Justices of Boston Municiple Court v. *Lydon*, —— U.S. ——, 104 S.Ct. 1805 (1984) 4

Kelso v. *Commonwealth*, 226 Va. 197, 308 S.E.2d 104 (1983) 6

KMA, Inc. v. *City of Newport News*, 228 Va. ——, 323 S.E.2d 78 (1984) 6

Ladner v. *United States*, 358 U.S. 169 (1958) 9

Miles v. *Commonwealth*, 205 Va. 462, 138 S.E.2d 22 (1964) 8

Missouri v. *Hunter*, 459 U.S. 359 (1983) 5, 6

Ohio v. *Johnson*, —— U.S. ——, 104 S.Ct. 2536 (1984) 6, 8, 10

Saunders v. *Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974) 1, 9

Stillwell v. *Commonwealth*, 219 Va. 214, 247 S.E.2d 360 (1978) 1

Page

Turner v. *Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981) 5

United States v. *Johnson*, 612 F.2d 843 (4th Cir. 1979) 5

Whalen v. *United States*, 445 U.S. 684 (1980) 4, 5

Constitutional Provisions

Constitution of the United States, Fifth Amendment 2, 4

Statutes

Sections 18.2-372 - 18.2-374, Code of Virginia (1950), as amended ..... *passim*

28 U.S.C. §1257(3) 2

SUP. CT. R. 17 9

No. 84-1537

In The

Supreme Court of the United States

October Term 1984

EDUCATIONAL BOOKS, INC.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

On January 29, 1985, the Supreme Court of Virginia, upon consideration of the record of the case and the arguments submitted by counsel involving the issue presently before this Court, refused the petition for appeal. (App. 1). The court held that there was no reversible error in the judgment complained of.[1]

---

[1] Refusal of a petition for appeal constitutes a judgment on the merits. *Saunders* v. *Reynolds,* 214 Va. 697, 204 S.E.2d 421 (1974); *see Stillwell* v. *Commonwealth,* 219 Va. 214, 226 n.4, 247 S.E.2d 360, 368 n.4 (1978).

JURISDICTION

The petitioner asserts that jurisdiction of this Court lies pursuant to 28 U.S.C. §1257(3). The final order denying the petition for appeal in this case was entered by the Supreme Court of Virginia on January 29, 1985.

CONSTITUTIONAL AND VIRGINIA STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision is the Fifth Amendment to the Constitution of the United States. The applicable statutory provisions are §§ 18.2-372 through 18.2-374 of the Code of Virginia (1950), as amended. These code sections are provided in their entirety in the appendix to this Brief in Opposition at (Resp. App. 1-2).

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. —)." References to the appendix of the Petition will be designated "(App. —)." The appendix to the Brief in Opposition will be referred to as "(Resp. App. —)." Any references to the trial record of the case will be designated "(R. —)." Citations to the trial transcript will refer to the transcript of December 7, 1983 and will be indicated by "(Tr. ____)." All statutory provisions, unless otherwise noted, refer to the Code of Virginia (1950), as amended.

STATEMENT OF THE CASE

Petitioner was tried before a jury on December 7, 1983, and convicted on all counts of a ten count indictment for knowingly possessing an "obscene item" with the intent to rent, in violation of § 18.2-374(4). The jury imposed the

maximum fine for each of the ten counts. The trial court denied the petitioner's post-conviction motions and imposed the jury's verdict. The Supreme Court of Virginia denied the petition for appeal on January 29, 1985, and thereby affirmed the convictions.

STATEMENT OF FACTS

In August of 1983, an investigator with the Fairfax County Police Department visited petitioner's premises (Educational Books) in Fairfax County, Virginia. The investigator viewed ten different films located in various projection booths throughout the store. A search warrant was issued and the films were seized pursuant to the investigator's report and subsequent to a magistrate's independent review of the films at the store on August 17, 1983. (Tr. 42-43).

Each of the ten films seized pursuant to the warrant was located in a coin/token movie viewing booth on petitioner's premises. Each film was advertised by a placard on the specific movie booth in which the film was set up for viewing. The advertisement described the specific type of sexual acts depicted in the film. Each independently titled film was found to be distinct, containing different individuals in different settings engaging in a variety of acts. (Tr. 36, 43-46). The jury found that each of the ten films violated § 18.2-374(4). (R. 31-40).

REASONS FOR DENYING THE WRIT

I.

The Principles Protecting the Defendant Against Double Jeopardy Have Not Been Violated in the Instant Case.

On December 7, 1983, in a single trial, the petitioner was convicted of ten separate violations of § 18.2-374(4). The

jury recommended the maximum fine on each count and the trial court accordingly imposed the sentence. Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was violated when the Commonwealth charged, and the jury convicted and punished on ten separate violations of a single statute. This claim is erroneous under traditional double jeopardy principles and the consistent legal analysis provided by this Court.

The ten offenses involved are not the "same offense" irrespective of any interpretation of the applicable Virginia statute. The instant case involved ten different films which were set up in different coin operated viewing booths throughout petitioner's store. These films necessarily had to be viewed independently by customers. The films differed in title, content, participants, quality, etc. . . . and were separate and distinct "obscene items". (R. 1-4, 31-40). The particular use of each was a separate violation of Virginia law. *See* § 18.2-374(4).

The Fifth Amendment, applicable to state proceedings through the Due Process Clause of the Fourteenth Amendment, provides that no person shall be twice placed in jeopardy of life or limb for the same offense. There are three separate guarantees assured by the constitutional prohibition against double jeopardy; however, only one of these guarantees applies to a situation involving a single trial, such as the case at bar. *See Justices of Boston Municiple Court* v. *Lydon,* —— U.S. ——, ——, 104 S.Ct. 1805, 1813 (1984); *Illinois* v. *Vitale,* 447 U.S. 410, 415 (1980); *Whalen* v. *United States,* 445 U.S. 684 (1980); *Blythe* v. *Commonwealth,* 222 Va. 722, 284 S.E.2d 796 (1981). The petitioner's convictions occurred as a result of a single trial and the role of the constitutional guarantee is limited to assuring that the court

does not exceed its legislative authorization by imposing multiple punishments for the same offense. *Brown* v. *Ohio,* 432 U.S. 161, 165 (1977); *Turner* v. *Commonwealth,* 221 Va. 513, 530, 273 S.E.2d 36, 46-47 (1980). The question as to constitutionally permissible punishments is no different from the question of what punishments the legislature intended to be imposed. *Whalen,* 445 U.S. at 698 (Blackmun, J., concurring); *Blythe,* 222 Va. at 725-726, 284 S.E.2d at 798.

The petitioner states that *Blockburger* v. *United States,* 284 U.S. 299 (1932) is dispositive regarding the applicability of double jeopardy to the instant case. The *Blockburger* test espoused by petitioner (Ptn. 6) was devised by this Court to determine Congressional intent and relates to whether the defendant's right against double jeopardy is violated when the same act or transaction constitutes a violation of *two distinct statutory provisions.* Thus, the *Blockburger* test of whether there are multiple offenses or merely a single offense relates to situations involving two statutory provisions. It is inapplicable in the present case because the petitioner was tried in a single trial pursuant to a ten count indictment alleging ten separate violations of a single statute. This Court did not apply the test in the first issue in *Blockburger* where only one statute was involved. *See Blockburger,* 284 U.S. at 304.

The guarantee against multiple punishments for multiple violations of the "same offense" should not be construed to be a guarantee against multiple punishment for multiple violations of the same statute. *See United States* v. *Johnson,* 612 F.2d 843, 846 n.2 (4th Cir. 1979). Further, *Blockburger* is merely one tool designed for determining legislative intent. It is not the *Blockburger* test but legislative intent which controls. *See Missouri* v. *Hunter,* 459 U.S. 359 (1983).

II.

Legislative Intent Controls With Regard to Multiple Punishments and the Virginia Supreme Court Has Ruled as a Matter of State Law That Each Item Constitutes a Separate Violation Warranting Separate Punishment.

The single trial situation limits the double jeopardy consideration to assuring that the legislative authorization to impose multiple punishments is not exceeded. The legislative intent behind the statute is controlling. *Hunter,* 459 U.S. 359; *Ohio* v. *Johnson,* ___ U.S. ___, 104 S.Ct. 2536 (1984). This Court has consistently held that a state court is the final authority with regard to interpretation and reinterpretation of its state's legislation. Further, the Court has held that it is bound by this interpretation and will not substitute its judgment for that of the state court's construction of state statutory provisions. *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *see Brown,* 432 U.S. at 167.

The Supreme Court of Virginia has interpreted § 18.2-374, the statutory provision at issue in the instant case, as prescribing multiple punishments for multiple violations of the same statute. *See KMA, Inc.* v. *City of Newport News,* 228 Va. ———, ———, 323 S.E.2d 78, 83 (1984). That court, in a case involving this petitioner, the statute at bar and the issue presented to this Court, held that the *Blockburger* test does not apply to situations involving multiple violations of a single statute. *Educational Books, Inc.* v. *Commonwealth,* 228 Va. ———, ———, 323 S.E.2d 84, 85 (1984). *Cf. Kelso* v. *Commonwealth,* 226 Va. 197, 308 S.E.2d 104 (1983); *Fitzgerald* v. *Commonwealth,* 223 Va. 615, 635, 292 S.E.2d 798, 810 (1982), *cert. denied,* 459 U.S. 1228 (1983). The case involved a situation where the defendant was convicted in a single trial for nine violations of § 18.2-374(3). Nine obscene magazines were purchased

from the defendant by two Fairfax County Police investigators in two separate sales. The petitioner raised identical arguments as in the instant case. The Supreme Court of Virginia affirmed the convictions indicating that there was no double jeopardy violation and that legislative intent to provide multiple punishments was controlling. The court further held that § 18.2-374 prohibits the sale of "any obscene item" and thus the gravamen of the offense is the sale of a single obscene item, not the number of sales. Since the Commonwealth was required to prove obscenity beyond a reasonable doubt as to each item (magazine) introduced into evidence and the jury was required to apply the same legal principles to nine different sets of evidentiary facts to determine whether each was obscene, each sale of each item constituted a separate punishable offense. Thus, even under the "same evidence" test, there were nine separate offenses. *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86.

The case at bar is substantially identical to *Educational Books.* The court's decision regarding the legal issue is controlling as is its interpretation of the legislative intent of the Virginia General Assembly. It is dispositive in the instant case. In this case the "obscene item" involves ten obscene films rather than nine obscene magazines. Subsection (4) under § 18.2-374 prohibits a person from knowingly having in his possession with intent to rent "any obscene item". Subsection (3) of the statute, construed in *Educational Books,* prohibits the sale of "any obscene item." The Supreme Court of Virginia interpreted the statutory language of § 18.2-374 as showing "unmistakable legislative intent that the sale of each obscene magazine shall constitute a separate offense". *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86. The court's construction of the statute must be applied in the situation involving renting ten different films. The Common-

wealth was responsible for proving that each of the specific films was obscene and that petitioner violated § 18.2-374(4) with regard to each film. Different evidence (i.e. each separate film) was necessary to prove each violation. The jury was asked to make an independent determination whether ten separate items were obscene. Ten separate convictions were warranted and ten punishments were properly imposed. (R. 31-40). *See Gavieres* v. *United States,* 220 U.S. 338 (1911); *Jones* v. *Commonwealth,* 218 Va. 18, 235 S.E.2d 313 (1977); *Miles* v. *Commonwealth,* 205 Va. 462, 138 S.E.2d 22 (1964).

If this Court chooses to reject the Supreme Court of Virginia's analysis that the *Blockburger* test does not apply, it must still accept the Supreme Court of Virginia's decision and interpretation of § 18.2-374 with regard to this single trial, multiple violation situation. This Court has held that even if the crimes are "the same" under *Blockburger,* if it is clear that the state's legislature intended to authorize cumulative punishments a court's review is at an end. *Johnson,* ____ U.S. at ____, 104 S.Ct. at 2541 n.8.

Petitioner maintains that "rental" and not "number of items" should control how many violations of the statute have occurred. Further, it is asserted that the statute is ambiguous with regard to the unit of prosecution and, therefore, ambiguity as to legislative intent must be resolved in favor of Educational Books. (Ptn. 7-12). The Supreme Court of Virginia has rejected petitioner's argument and held that the statutory language shows "unmistakable legislative intent" that each obscene item is a separate entity which may be prosecuted as a separate crime. The court went on to note that § 18.2-373, which describes what constitutes "obscene items" is phrased in the singular, and that such is consistent with the § 18.2-374 prohibitions regarding

various uses of "any obscene item". The provisions of the statute are consistently worded in the singular. *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86. *See* §§ 18.2-372 to 18.2-374.

The rule of lenity advocated by petitioner is not cognizable and is inapplicable in the present case. This "rule" is one of statutory construction and does not present a federal constitutional question. *See* SUP. CT. R. 17; *Barclay* v. *Florida,* 463 U.S. ——, ——, 103 S.Ct. 3418, 3422-3423, *reh. denied,* —— U.S. ——, 104 S.Ct. 209 (1983). Further, this Court has emphasized that the rule of lenity may only be applied when there is statutory ambiguity. It is a rule of statutory construction to be used only to resolve an ambiguity and may not be used to create one. *Albernaz* v. *United States,* 450 U.S. 333, 342-343 (1981); *see Bifulco* v. *United States,* 447 U.S. 381 (1980); *Ladner* v. *United States,* 358 U.S. 169 (1958). Absent clear legislative intent to the contrary, a statute's language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The language of §§ 18.2-373 and 18.2-374, as already determined by the Supreme Court of Virginia, shows clear intent by use of "singular" terms. (Resp. App. 1-2). *Educational Books,* 228 Va. at ——, 323 S.E.2d at 85-86. In light of the principles established by this Court and the language of the statute involved, the rule of lenity does not apply in this case.

The petitioner's case has been reviewed by the Supreme Court of Virginia and affirmed. The court's refusal of the petition for appeal and its finding that there was no reversible error constitutes a decision on the merits. (App. 1). *Jackson* v. *Virginia,* 443 U.S. 307, 311 (1979); *Saunders,* 214 Va. at 702, 204 S.E.2d at 424.

The sole matter set forth in this petition involves inter-

pretation of a Virginia state statute. The question of whether punishments are "multiple" is one of legislative intent since the substantive power to prescribe crimes and determine punishments is vested with the legislature. *Johnson,* ____ U.S. at ____, 104 S.Ct. at 2541. The Supreme Court of Virginia is the final arbiter of Virginia law, and its interpretation of a state statute is binding upon this Court. *Garner,* 368 U.S. at 166. The petition in this case should be denied. The Supreme Court of Virginia has ruled on the merits and affirmed the decision of the lower court. In addition, that court has held that § 18.2-374 provides for multiple punishments in a case so factually similar and legally identical to the instant case that it is certainly dispositive of the issue before this Court. *Educational Books,* 228 Va. ——, 323 S.E.2d 84.

CONCLUSION

The merits of the petitioner's claim have been carefully considered by the Supreme Court of Virginia in the instant case as well as in *Educational Books,* 228 Va. ____, 323 S.E.2d 84. That court correctly applied the well-established legal principles and precedents set forth by this Court, and properly refused to grant Educational Books' petition for appeal.

No constitutional guarantee was violated by the Commonwealth in the instant case. Virginia law was properly applied consistent with the legislative intent made obvious by the wording of the statute at bar. The highest appellate court of the Commonwealth affirmed the lower court's decision, finding separate punishments for multiple violations of § 18.2-374 to be legislatively authorized. The factual situation in the instant case presents no new circumstances warranting review, nor is this Court in a position to develop

a new or different constitutional rule based upon the issue. For the reasons set forth by the Commonwealth, the petition should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By counsel:

GERALD L. BALILES
Attorney General of Virginia

*JERRY P. SLONAKER
Senior Assistant Attorney General

MARLA LYNN GRAFF
Assistant Attorney General

*Counsel of Record

April, 1985

Article 5.

Obscenity and Related Offenses.

Section 18.2-372. "Obscene" defined. The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Section 18.2-373. Obscene items enumerated. Obscene items shall include:

(1) Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture, videotape recording; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds.

Section 18.2-374. Production, publication, sale, possession, etc., of obscene items. It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate

commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.